ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

Comments of the Yellow Pages Publishers Association

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Executive Summary of the Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA") believes that the Commission should treat electronic publishing (regulated by section 274) differently from other interLATA information services (regulated under section 272). Congress clearly chose not to regulate electronic publishing under section 272 and instead placed it separately in section 274, subject to its own, different set of requirements.

The Commission should adopt a definition of electronic publishing consistent with Commission's *electronic publishing NPRM* and consistent with the statute. Congress intended that electronic publishing consist of the BOC owning or controlling information transmitted over its own basic local exchange telephone service. Both elements must be present -- control of the information and transmission over its own basic local exchange facilities. Mere transmission or financial interest in information by itself does not qualify as electronic publishing under the statute.

The Commission should not impose additional safeguards beyond those enumerated in section 272. The Commission tentatively concludes that it "should interpret the 'operate independently' requirement in section 272(b)(1) as imposing requirements beyond those listed in subsections 272(b)(2)-(5)." There is no statutory authority for imposing additional requirements. Congress did not intend for the terms "operate independently" to serve as a separate source for substantive regulations. Instead, "operate independently" should be read to be defined by the rest of the enumerated requirements in section 272(b).

Furthermore, the Commission tentatively concludes in paragraph 62 that section 272(b)(3) "prohibits the sharing of in-house functions such as operating, installation, and

maintenance personnel, including the sharing of administrative services that are permitted under Computer II." The statute does not require the separate affiliate to provide its own "in-house" functions, including administrative services such as accounting, legal services, personnel management, finance, tax, insurance and pension services. Such a conclusion is a clear expansion of the statute. The sharing of these "in-house" functions will not create any competitive advantage for the BOC or its affiliate, and will not harm the ratepayer in any manner.

In paragraphs 48, 49, and 50, the Commission asks whether the Commission's rules in Computer II, Computer III, or ONA should be retained, to the extent those rules are consistent with the 1996 Act. YPPA contends these rules should not be retained. Congress has determined that the structural separation rules contained in sections 272 and 274 are all that is necessary to protect the ratepayers from harm and competitors from anti-competitive behavior. Additional requirements would overregulate when Congress chose not to do so, and only harm the ability to efficiently offer services to the public.

The joint marketing requirements in section 274 are significantly different than those in sections 271 and 272. The Commission should not impose any of the restrictions contained in section 272 on electronic publishing affiliates. Additionally, the holding company and the affiliates should be permitted to joint market services, and should be permitted to share marketing personnel.

Finally, YPPA believes that the Commission should read "unjust and unreasonable" into the non-discrimination standard. Failure to do so will result in significant unintended problems.

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To: The Commission

Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA"), by its attorneys, hereby submits Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. YPPA is the largest trade association in the Yellow Pages industry, with more than 400 members. Its membership, which represents 90 percent of all Yellow Pages directories published in North America, generates 98 percent of all Yellow Pages advertising revenues. In addition, many of YPPA's members are affiliated with local telephone exchange providers. YPPA is submitting comments in this proceeding on the Commission's implementation of sections 271 and 272, Non-Accounting Safeguards, because many of the issues raised in this rulemaking are of interest to YPPA's members.

For example, many of YPPA's member companies produce, or plan to produce, electronic services that could be affected by rules implementing section 272. Although many of these services involve electronic publishing, and thus are covered by section 274 rather

than section 272, some of the services may be related to, or marketed with other services that could be regarded as covered by the interLATA information service requirements.

I. Relationship of Section 272 and Section 274

Congress clearly chose not to regulate electronic publishing under section 272 and instead placed it separately in section 274, subject to its own, different set of requirements. The Commission readily recognizes this fact at several points in this proceeding, remarking that "electronic publishing . . . and alarm services . . . are exempted from the section 272 separate affiliate requirements, and are subject to their own specific statutory separate affiliate and/or nondiscrimination requirements."[1/]

YPPA understands that should a BOC offer electronic publishing within the same affiliate as it offers interLATA telecommunication services, interLATA information services, or manufacturing subject to section 272 separate affiliate requirements, the affiliate must meet the structural separation requirements of both sections 272 and 274. The other requirements of sections 272 and 274 (such as joint marketing and non-discrimination requirements), however, cannot meaningfully be applied on an entity-wide basis and need to be applied on a service by service basis. As an example, should a BOC decide to offer interLATA telecommunications services and electronic publishing through the same affiliate, the affiliate would have to meet the structural separation requirements of both section 272(b) and section 274(b). Yet, when providing interLATA telecommunications services, the affiliate would be required to follow the joint marketing requirements of section 272(g), but

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1/ ¶ 31, footnote 60. See also, ¶¶ 41 and 54, confirming this interpretation.

when providing electronic publishing, the affiliate would be required to follow the joint marketing requirements of section 274(c). This is the best way to implement the statute.

Furthermore, it is worth noting that section 274 covers both interLATA and intraLATA electronic publishing. Although the Commission recognizes that interLATA, but not intraLATA, information services are subject to the separate affiliate requirements of section 272, no such distinction is made with electronic publishing. If Congress had intended to distinguish between inter and intraLATA electronic publishing, it could have done so as it did in section 272 for inter and intraLATA information services.

II. Definition of Electronic Publishing

The Commission indicates in paragraph 53 that it seeks comments to "distinguish information services that are subject to the section 272 requirements from electronic publishing services that are subject to the section 274 requirements," but, the Commission also notes that it "will examine the meaning of the phrase 'electronic publishing' in greater depth" in its *Electronic Publishing NPRM*.[2/] We therefore ask the Commission to adopt a definition of electronic publishing consistent with that proceeding and consistent with the statute.

Congress intended that electronic publishing consist of the BOC owning or controlling information transmitted over its own basic local exchange telephone service. Both elements must be present -- control of the information and transmission over its own basic local exchange facilities. The Commission asks in paragraph 53 whether it should classify as

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[2/] Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, Notice of Proposed Rulemaking, FCC 96-310, CC Docket No. 96-152 (released July 18, 1996), ¶ 35.

electronic publishing "services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service."[3/] YPPA believes the Commission should, indeed, clarify that electronic publishing requires the dissemination by the BOC of information over its own local exchange facilities in which it has control or at least a ten percent financial interest.

Mere transmission or financial interest in information by itself does not qualify as electronic publishing under the statute. Section 274(a) only restricts the BOC when the BOC transmits information which it owns or controls over its own or its affiliate's basic telephone service.[4/] Section 274(h)(2)(B) exempts from electronic publishing information transmitted by the BOC as a common carrier. Section 274(h)(2)(C) also clarifies that transmission of information by a common carrier or as part of a gateway is not electronic publishing.

The electronic publishing definition is one of the most extensive in the statute. The clear intent is to eliminate any potential discrimination where a BOC controls a content provider, and also controls the access to the customer. It follows from the statute that financial interest alone in information (such as a database), absent transmission or other dissemination by the BOC over its own wires, does not qualify as electronic publishing.

[3/] Ownership is defined in Section 274(i)(8) as a direct or indirect equity interest of at least 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity. This ten percent threshold should be applied by the Commission in determining whether there is a financial interest.

[4/] Section 274 should only apply when the BOC transmits information over its own or its affiliate's network when the BOC or the affiliate is providing that transmission as a retail service. If a BOC, however, provides electronic publishing services, and utilizes the transmission services of a BOC local telephone competitor (whether that competitor purchases unbundled elements from the BOC, purchases service for resale from the BOC, or uses no BOC facilities whatsoever), section 274(a) would not apply.

Therefore, we encourage the Commission to adopt its proposal that only the combination of transmission and substantial ownership, not transmission by itself or ownership of information by itself, qualifies as electronic publishing.

III. **Scope and Definition of "Operating Independently"**

In paragraph 57, the Commission tentatively concludes that it "should interpret the 'operate independently' requirement in section 272(b)(1) as imposing requirements beyond those listed in subsections 272(b)(2)-(5)." As a result, it seeks comments in paragraphs 58-59 on whether the Computer II[5/] and Competitive Carrier[6/] separation requirements would serve as useful additional safeguards in this context.

There is no statutory authority for imposing additional requirements. Congress did not intend for the terms "operate independently" to serve as a separate source for substantive regulations. Instead, "operate independently" should be read to be defined by the rest of the enumerated requirements in section 272(b).

5/ Amendment of Section 64.702 of the Commissions Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 477 (1980)("Computer II Final Decision"), recon., 84 FCC 2d 50 (1980) (Computer II Reconsideration Order), further recon. 88 FCC 2d 512 (1981) (Computer II Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

6/ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No.79-252, First Report and Order, 85 FCC 2d 1 (1980) (Competitive Carrier First Report and Order); Fourth Report and Order, 95 FCC 2d 554 (1983) (Competitive Carrier Fourth Report and Order) vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Competitive Carrier Fifth Report and Order).

The provision imposing the "operate independently" language originated in the House of Representatives and was adopted in conference with the Senate before being enacted in the 1996 Act. It appears that Congress attempted to mirror the format (but not necessarily the content) of the Commission's separation rules in 47 C.F.R. § 64.702(c)(2), which require a separate subsidiary to "operate independently [from the BOC's communications common carrier, among other things, by] hav[ing] separate officers, [and] utiliz[ing] separate operating, marketing, installation, and maintenance personnel . . . ."[7/] The use of the term "operate independently" in 47 C.F.R. § 64.702(c)(2) is a description of the enumerated separation requirements that follows in the rule, not a separate basis for imposing additional requirements as is proposed in this proceeding.

Similarly, in other Commission rules, the term "operate independently" has been used as generally descriptive. The separation rules for BOC cellular affiliates state that the affiliate "must operate independently in the provision of cellular service," and lists four criteria for satisfying this general guideline: (1) separate books; (2) separate officers; (3) separate operating, marketing, installation and maintenance personnel; and (4) separate computer and transmission facilities.[8/]

Given the apparent Congressional intent not to attach additional requirements to the term "operate independently" and the Commission's use of the term itself, the Commission

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[7/] The Commission adopted this language as part of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 477 (1980).

[8/] 47 C.F.R. § 22.903(b) (1995).

should conclude that the term "operate independently" in subsection 272(b)(1) does not require it to impose safeguards beyond those specified in subsections 272(b)(2)-(5).

The Commission also seeks comment in paragraph 60 on the "relevance of the 'operated independently' requirement in section 274(b) [relating to electronic publishing] when construing what Congress intended in section 272(b)(1)." We remind the Commission, as it has already noted and as mentioned above, that electronic publishing is subject to its own set of requirements as set out in section 274. Therefore, in looking at "operate independently" in this proceeding, the Commission should not impose any requirements on electronic publishing. The Commission should explore the meaning of operate independently in connection with electronic publishing under Section 274 in its *Electronic Publishing NPRM*.

Furthermore, the Commission tentatively concludes in paragraph 62 that section 272(b)(3) "prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services that are permitted under Computer II." The statute does not require the separate affiliate to provide its own "in-house" functions, including administrative services such as accounting, legal services, personnel management, finance, tax, insurance and pension services. Such a conclusion is a clear expansion of the statute and Computer II at a time when Congress is attempting to reduce such overregulation. The ability to share such in-house services will permit the BOC and affiliates to share functions that would otherwise have to be duplicated by the affiliate, thereby raising operating costs, and ultimately raising costs to consumers. The sharing of

these "in-house" functions will not create any competitive advantage for the BOC or its affiliate, and will not harm the ratepayer in any manner.

IV. Imposition of Additional Safeguards

In paragraphs 48, 49, and 50, the Commission asks whether the Commission's rules in Computer II, Computer III,[9/] or ONA[10/] should be retained, to the extent those rules are consistent with the 1996 Act. As stated above, the Commission should not impose any additional safeguards, whether gleaned from Computer III, Computer II, or ONA, or any other existing Commission proceeding that are not found in the statute. Congress has determined that the structural separation rules contained in sections 272 and 274 are all that is necessary to protect the ratepayers from harm and competitors from anti-competitive behavior. Additional requirements would overregulate when Congress chose not to do so, and only harm the ability to efficiently offer services to the public.

9/ Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), recon., 2 FCC Rcd. 3035 (1987), further recon., 3 FCC Rcd. 1135 (1988), second further recon., 4 FCC Rcd. 5927 (1989); Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd. 3072 (1987), recon., 3 FCC Rcd. 1150 (1988), further recon., 4 FCC Rcd. 5927 (1989); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd. 7719 (1990), recon., 7 FCC Rcd. 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); BOC Safeguards Order, 6 FCC Rcd. 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995).

10/ See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon. 5 FCC Rcd 3084 (1990), ; 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993); 6 FCC Rcd 7646 (1991); 8 FCC Rcd 2026 (1993), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

For instance, while Congress did retain some of the elements of Computer II, Congress chose not to retain all of the Computer II requirements. Computer II prohibits the sharing of space on which are located transmission equipment or facilities used in the provision of basic transmission services; requires separate computer facilities and software development; prohibits performance by any entity affiliated with the BOC of any function related to the training, operation, installation, marketing, and maintenance services associated with the affiliate's offerings; requires prior approval of the new affiliate's capitalization plan; and requires the filing with the Commission of all contracts between the BOC and affiliate. Congress chose not to impose any of these requirements. Additionally, Computer II permits the sharing of directors, which is prohibited under Section 272(b)(3).

If Congress intended that the Computer II rules be retained, Congress could have either codified them, or taken no action in this area whatsoever, leaving the BOCs to operate under the Commission's current regulatory regime. Instead, Congress determined that, under the new telecommunications paradigm created by the legislation, the rules of Section 272 (or section 274 for electronic publishing) are the rules under which the BOC affiliates should operate. The Commission should not impose any requirements on BOC affiliates that are not required by the Telecommunications Act of 1996, avoiding the need to conform to multiple sets of rules.

V. Joint Marketing

The Commission seeks comment in paragraph 93 on "whether the joint marketing provision in section 274(c) has any indirect bearing on how we should apply the joint marketing provisions in sections 271 and 272." The joint marketing requirements in section

274 are significantly different than those in sections 271 and 272. For example, under section 274(c), a BOC can provide inbound telemarketing or referral services for electronic publishing for an affiliate, separate affiliate, or electronic publishing joint venture as long as it does so on a non-discriminatory basis. In addition, section 274(c) allows for BOCs to "engage in nondiscriminatory teaming or business arrangements" for electronic publishing with separate affiliates, subject to certain conditions, whereas sections 271 and 272 contain no such provision. Given the differences among sections 274, 271 and 272, combined with the clear Congressional intent to create separate requirements for electronic publishing under section 274, section 272 requirements should not affect electronic publishing joint marketing.[11/]

YPPA also notes that section 272(g)(1) permits a separate affiliate to market a BOC's telephone exchange services as long as it "permits other entities offering the same or similar service to market and sell its telephone exchange services." Otherwise, it is free to market a BOC's other services without restriction.

With regard to sharing of personnel in joint marketing and other ventures, YPPA notes that Section 272(b)(3) does not prohibit the sharing of officers, directors, and employees between the separated affiliate and another affiliate or the BOC holding company. Section 272(b)(3) prohibits sharing only between the separate affiliate and "the Bell operating company".[12/] This reading of Section 272(b)(3) is confirmed by that section's legislative

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[11/] YPPA also plans to comment in more detail on section 274 joint marketing requirements in the Commission's *Electronic Publishing NPRM*.

[12/] Significantly, the Act expressly excludes from the definition of "Bell Operating Company" any "affiliate" other than enumerated BOC operating companies and their

history, which specifically states that the sharing prohibitions are intended to apply between the separate affiliate and "any entity that *provides telephone exchange service*" (emphasis added).[13/] Thus, Section 272(b)(3) prohibits sharing only between the separate affiliate and whatever entity actually provides telephone exchange service, i.e., the BOC itself. Nothing in the language of Section 272(b)(3) nor its legislative history suggests any Congressional intent to prohibit sharing between the separate affiliate and other affiliates or the holding company.

VI. Non-discrimination

The Commission notes in paragraph 69 that section 202 makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services." (Emphasis added.) As a result, the Commission asks in paragraph 72 whether section 272(c)(1) imposes a stricter standard for compliance because that section states that a BOC "may not discriminate" between a separate affiliate or affiliate "and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards," without specifying that discrimination must be unjust or unreasonable.

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successors of assigns that provide wireline telephone exchange service. 47 U.S.C. § 153(4)(C). This definition excludes BOC holding companies.

13/ Joint Explanatory Statement of the Committee on Conference, Report 104-458, p. 150 (summarizing Section 102 of the Senate bill, which was adopted by the conference with modifications in other areas, as "requir[ing] that, to the extent that a BOC engages in certain businesses, it must do so through an entity that is separate from any entities that provide telephone exchange service.")

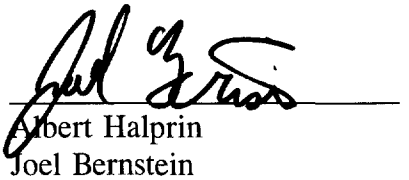
YPPA believes that "unjust or unreasonable" discrimination is the proper, more balanced standard that Congress implicitly intended rather than a flat ban on discrimination.[14/] The word "discrimination," without being read in the context of "unjust or unreasonable" is contrary to practice and precedent. Certainly a BOC may choose an affiliate as a supplier of goods or services if the choice is reasonable and not unjust. Congress could not have intended any other result. To assume otherwise, raises the questions of when may a BOC contract with an affiliate and to what lengths and expense will a BOC have to go in choosing a supplier to comply with an absolute non-discrimination requirement which does not account for reasonable choice. Therefore, we urge the Commission to maintain the flexibility of the generally accepted and workable "unjust or unreasonable discrimination" standard which Congress surely intended.

VII. **Conclusion**

Congress enacted separate statutory sections for BOC provision of electronic publishing and BOC provision of other competitive services. The Commission's rules for Section 272 affiliates should not affect the Commission's rules for Section 274 affiliates. Additionally, the Commission should not impose additional safeguards on these affiliates other than those specifically required by the statute.

[14/] By its nature, anytime a contract is formed, anyone not a party is literally discriminated against. Such discrimination, however, is reasonable, and is the normal course of business.

Respectfully submitted,



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